No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S PETITION FOR REHEARING.

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant above named respectfully petitions for a rehearing after decision rendered by this court on the 12th day of May, 1948, affirming the judgment of the District Court of the United States for the Southern District of California, Central Division.

The grounds of such petition are as follows:

1. On the date that the decision was rendered appellant's counsel found additional California authorities directly determining that the Warehouse Receipts Act did not repeal the Civil Code section relating to warehousing. By the time appellant's counsel were able to request permission to submit such authorities, the above decision had already been made.

2. The decision is contrary to the law as established by the decisions of the appellate courts of the State of California.

3. The decision rests upon three decisions, none of which can be regarded as controlling precedents in the State of California for the following reasons:

(a) It does not appear that the Supreme Court of the United States, in *Commercial National Bank v. Canal-Louisiana B. & T. Co.,* 239 U. S. 520, was speaking of repeal of any statutes by implication. The question there was whether the case law existing prior to the adoption of the Warehouse Receipts Act was modified by that act to the extent that it was inconsistent. The case did not involve the question of the repeal of any statute by implication.

(b) The effect of the case of *Heffron v. Bank of America,* 113 F. (2d) 240, must be regarded as having been nullified by the enactment of Section 3440.5 of the Civil Code. That enactment destroys the rule in the *Heffron* case that the Warehouse Receipts Act alone governs. It repudiates the doctrine of that case to the effect that legislation relating to warehousing cannot validly exist outside of, or separate and apart from, the Warehouse Receipts Act.

(c) The case of *Jewett v. City Transfer & Storage Co.,* 128 Cal. App. 551, is neither an authority for the proposition that legislation relating to warehousing does not exist outside of the Warehouse Receipts Act, nor is it an authority for the contention that earlier legislation not repugnant to the Warehouse Receipts Act was repealed by that Act.

The Validity and Continued Efficacy of the Civil Code Sections Has Been Sustained on Numerous Occasions by the California Courts.

Due perhaps partially to deficiencies in the texts dealing with warehousing, appellant's counsel overlooked some of the most important decisions pertaining to this question. These decisions are directly contrary to the decision of this court.

In *Lewis-Simas-Jones Co. v. C. Kee & Co.*, 27 Cal. App. 135, plaintiff sued the defendant for the purchase price of potatoes sold by plaintiff while they were stored in a public warehouse. Plaintiff did not transfer any warehouse receipts to the defendant, but gave the defendant a written order on the warehouseman, directing delivery of the potatoes to the defendant. Later the defendant repudiated the transaction and claimed that there had been no delivery of the potatoes.

The court concerned itself with the question whether there had been a symbolic delivery by giving the defendant the written order on the warehouseman. It rejected the appellant's contention that the Warehouse Receipts Act of 1909 exclusively governed the transfer of warehoused merchandise. Under Sections 37-43 of that Act, it was necessary for plaintiff to have transferred his warehouse receipts to the defendant to accomplish a transfer or delivery of the potatoes, and defendant had not done this. The court said that the law as it existed prior to the Warehouse Receipts Act and as it was embodied in Section 1858d of the Civil Code, permitted the delivery of the warehoused property "upon the written order of the person to whom the receipt was issued."

This is a direct decision to the effect that the Uniform Warehouse Receipts Act did not repeal the Civil Code

sections, and in referring to the Uniform Warehouse Receipts Act, the court said, at page 138:

> "Upon the reading of the entire act we do not find that there is anywhere expressed in it an intention to require a departure from the rule laid down in the earlier cases and remaining unchanged up to the time of its passage, making the written order of a depositor of goods in a warehouse, upon which there has been issued a non-negotiable receipt, sufficient to pass, by its delivery, receipt, and acceptance, the title and symbolical possession of personal property not capable of manual delivery so as to satisfy the statute of frauds, and entitled the seller to recover from the buyer its purchase price."

In *Norton v. Lyon Van & Storage Co.,* 9 Cal. App. (2d) 199, plaintiff's action was predicated upon the warehouse company's wrongful refusal to return his goods, and the question was whether the warehouse company had lawfully enforced its lien thereon for storage. The plaintiff on his appeal contended that the Warehouse Receipts Act providing for notice of sale in the enforcement of the lien was unconstitutional. The court first said that it saw no reason for not sustaining the constitutionality of the Act, insofar as the provisions relating to warehousemen's liens were concerned. It then went on to say, at page 204:

> "Even in the absence of the Warehouse Receipts Act, a depositary for hire has a lien for storage charges and expenses of sale (Civ. Code, secs. 1856, 3051), and in the event of nonpayment may sell the property deposited. (Civ. Code, sec. 3052.)"

The sections 3051 and 3052 referred to in such opinion as being valid and applicable are the same sections that the earlier case of *Jewett v. City Transfer & Storage Co.,*

supra, held were repealed by the Warehouse Receipts Act. This later case, therefore, is directly contrary to the statement in the *Jewett* case and is an additional authority for the proposition that both enactments exist concurrently insofar as their provisions are not directly repugnant.

Section 1856 of the Civil Code, referred to in the above opinion relates to the lien of a depositary for storage, and the recognition of the continued operation of this section is also a direct decision that the Civil Code sections relating to warehousing were not repealed by the enactment of the Warehouse Receipts Act.

In *A. Widemann Co. v. Digges,* 21 Cal. App. 342, the court affirmed a judgment in favor of the plaintiff upon a sales agreement for the sale of warehoused grain. In answer to the contention that there had been no timely tender of delivery on the plaintiff's part, the court said, at page 348:

> "The transfer of negotiable warehouse receipts is a symbolical delivery of the goods called for by them, and passes the title thereto as effectually as if an actual delivery had been made. (Civ. Code sec. 1858b.)"

This transaction took place in 1910, a year after the adoption of the Uniform Warehouse Receipts Act, and the decision of the Supreme Court was on February 28, 1913, four years after the adoption of the Uniform Warehouse Receipts Act.

In *Chatterton v. Boone,* 81 A. C. A. 1108 (decided October 20, 1947), the court affirmed a judgment against the defendant warehouse company for damages resulting from a fire on the theory that the warehouse company had failed to exercise reasonable care in the protection

and preservation of the goods after the fire, as required by Section 1858(e) of the Civil Code.

In *Northwestern M. F. Assn. v. Pacific Co.,* 187 Cal. 38, in determining the liability of the warehouse company for destruction of goods by fire, the court referred to and quoted the provisions of Section 1858(e) of the Civil Code as governing the care to be exercised.

In *Defense Supplies Corporation v. Lawrence Warehouse Company,* District Court, N. D. California, S. D., 67 Fed. Supp. 16, the defendant warehouse company was sued along with other defendants for damages to tires which had been warehoused, and the court referred to both the provisions of the Civil Code and the Warehouse Receipts Act as concurrently governing the liability. On page 20, the court said:

> "If Capitol Chevrolet Company, the agent of Lawrence Warehouse Company, failed to use reasonable care for the preservation of plaintiff's goods whereby the damage was caused or contributed to, Lawrence Warehouse Company is liable to plaintiff. California Warehouse Receipts Act, Sec. 21, Gen. Laws, Act 9059; California Civil Code, Sec. 1858e."

The above cited cases all demonstrate that the courts continue to regard the Civil Code sections dealing with warehousing as concurrently effective along with the Warehouse Receipts Act. The last three of those cases deal with the care to be exercised by warehousemen as defined by Section 1858e of the Civil Code, but as is pointed out in the *Defense Supplies Corporation* case, Section 21 of the Warehouse Receipts Act also deals with the subject of care, and yet the courts have not interpreted this as a repeal by implication of the Civil Code sections dealing with the care to be exercised by warehousemen.

The decision in the case at bar is contrary to all of the above cited cases. It is also in conflict with the rule of the authorities dealing with repeal by implication which we cited on pages 19 and 20 of Appellant's Opening Brief, and on page 13 of Appellant's Reply Brief.

The California State Legislature Has Expressly Repudiated the Doctrine of Heffron v. Bank of America, Supra, by the Enactment of Section 3440.5 of the Civil Code.

During the time that such case was pending on appeal, Section 3440.5 of the Civil Code was enacted, and subsequent to the decision in the *Heffron* case in 113 F. (2d) 240, the legislature amended Section 3440.5 so that the section must be regarded as a direct repudiation of the *Heffron* decision. The decision in the *Heffron* case was that Section 3440, relating to the transfer of stock in trade in bulk, did not pertain to such goods when they were stored in a warehouse and warehouse receipts were issued therefor. This court said in the *Heffron* case that insofar as Section 3440 might pertain to warehoused goods, the same was repealed by the Warehouse Receipts Act. That ruling was predicated upon the proposition that the Warehouse Receipts Act since its enactment was the exclusive source of the law relating to warehousing.

The rule of that decision, if it were still the law, would operate to destroy Section 3440.5 just as effectively as it nullified Section 3440 of the Civil Code.

The Case of Jewett v. City Transfer & Storage Co., Supra, Does Not Sustain the Proposition That Sections 1858 to 1858f, Civil Code, Were Repealed by the Warehouse Receipts Act.

The *Jewett* case does not even deal with these sections. It deals with Sections 3051 and 3052 of the Civil Code relating to storage liens and the enforcement thereof. The headlight of that decision is the court's observation that Section 35 of the Warehouse Receipts Act did not preclude other remedies allowed for the enforcement of liens against personal property. After making such observation, one would logically assume that the court would have proceeded to hold that Section 3052 of the Civil Code would provide another remedy if the procedure therein was in any way different from the procedure specified under Section 33 of the Warehouse Receipts Act. Conversely, the court said that since the remedied were the same; that is, both providing for sale of the goods after notice, Section 3052 of the Civil Code was superseded by Section 33 of the Warehouse Receipts Act.

If the decision is to be regarded as sound at all, it must be predicated upon the ground that Section 33 specifies a particular type of notice of sale that must be complied with, and to the extent that any earlier legislation specified a different type of notice, such earlier legislation cannot be regarded as relaxing the requirements of the later legislation embodied in the Warehouse Receipts Law. That is all there is to the decision in the *Jewett* case. It should not be forgotten that the *Jewett* case is directly

contrary to the *Norton* case, *supra,* which deals with the same statutes.

We have no situation here that is parallel to that existing in the *Jewett* case. In the first place, the requirement of Section 1858b of the Civil Code that warehouse receipts show the rate of storage charges is not inconsistent or repugnant to the requirements of subsection (e) of Section 2 of the Warehouse Receipts Act. Both enactments require that the warehouse receipts show the rate of storage charges, but the earlier enactment in the Civil Code specifies a criminal penalty for violation thereof.

We are not dealing with a situation where the early enactment makes one requirement and the subsequent enactment specifies a requirement that is repugnant to the requirement of the first statute. We are not even dealing with a situation where appellee can show compliance with either of these enactments. In order to have a situation parallel to the *Jewett* case, appellee would have to show that the two enactments embodied inconsistent requirements, and that appellee had complied with the requirements of the Warehouse Receipts Act.

Conclusion.

In the interests of clarifying the law as evidenced by the state court decisions and Section 3440.5 of the Civil Code on the one hand, and the *Heffron* case on the other, we respectfully submit that a rehearing should be granted. Legislation which has not been expressly repealed should not be cast aside lightly, particularly where the Legisla-

ture has continued that legislation on the books over these many years, and where the decisions of the California courts have consistently recognized its vitality.

Respectfully submitted,

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MCLAUGHLIN, MCGINLEY & HANSON,
By JAMES A. MCLAUGHLIN,
Attorneys for Appellant.

Certificate of Counsel.

The undersigned counsel for the appellant above named hereby certifies that in his judgment the foregoing petition for rehearing of the above named appellant is well founded and that such petition is not interposed for delay.

JAMES A. MCLAUGHLIN.